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EXAMINER

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/840,064
Filing Date: May 06, 2004
Appellant(s): BUCHNER, KELLY W.

Frank Catalano
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed July 24, 2008 appealing from the Office action mailed December 20, 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1,5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Grey et al (5,397,338).

Grey teaches a device capable of stimulating various portions of the body to treat pain and promote healing of tissue including muscle, nerve, tendon, bone and skin (col.1:1-47, and col. 4:10-23). As shown in figure 1 of Grey, two electrodes 14 are considered to be appellant's emitter pads. As taught in column 10, lines 19, 20, the electrodes can be placed about a joint experiencing pain such that one is on a lateral side and another is on the medial side. In appellant's claim 1, the step of 'sandwiching' tissue between the pads is considered to be obvious over the placement of the electrodes of Grey since tissue is between the electrodes in Grey in a sandwich like manner. Further, the ordinarily skilled artisan could reasonably be expected to change the orientation of the electrodes of Grey in order to most optimally stimulate the patient, depending upon the particular ailment being treated. A certain amount of experimentation as to the best orientation of the electrodes of Grey would be obvious in order to maximize treatment efficiency and results. Further, figures 4 and 5 of Grey teach generating a biphasic pulse sequence which is applied to treat the patient. As taught in column 1, lines 32-35 of Grey, the pulse amplitude, pulse width, and pulse rate can be adjusted depending upon user preferences. Thus, the Grey device is considered to be able to stimulate deep layered muscle contractions, as called for in appellant's claim 1. One of ordinary skill would be expected to alter the stimulation parameters to treat the type of pain

experienced by the patient, and would use a higher intensity stimulation if that was more effective in treating the pain than a lower intensity, for example. The subject matter of appellant's claim 5 is considered to be common sensical in that the ordinary user would seek the most effective intensity levels (with respect to treatment efficacy and comfortable level of stimulation intensity), and not use stimulation that was intolerably painful.

(10) Response to Argument

Appellant argues that Grey does not treat fibromyalgia. While the term 'fibromyalgia' may not appear in the Grey patent, it is the examiner's contention that *symptoms* of such are treated. Even though the term 'fibromyalgia' has been first used relatively recently in the medical literature, it does not mean that pain from what is now known as 'fibromyalgia' wasn't treated in the past, with devices such as shown by Grey. Further, the last page of appellant's brief (page 7 of the appendix) states that there is no test for the diagnosis of fibromyalgia, and that fibromyalgia can be associated with other conditions. Appellant's claim 1, line 3 states that an 'articular joint evidencing symptoms of fibromyalgia is identified', not that fibromyalgia *itself* is diagnosed. Thus, it appears that many conditions 'evidence *symptoms* of fibromyalgia', including those symptoms that are treated by the device of Grey.

Appellant further argues that the Grey device does not teach stimulating deep layered muscle contractions. However, electrical current strong enough to promote healing of

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tissue such as tendon, muscle and bone, as taught in Grey, would be enough to provide for deep layered muscle contractions in the typical patient. The level of stimulation intensity would necessarily vary from patient to patient depending upon the body mass of the patient and the severity of the pain to be treated.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Scott M. Getzow/

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